UPREME COURT. U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 451

JEFF FORT,

Petitioner,

VS.

STATE OF ILLINOIS,

Respondent.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT.

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Introduction

Petitioner (defendant) presents this reply brief to show that review should be granted in this case, and to meet the State's Answer, because:

a. The construction placed on the resisting arrest statute by the Illinois Appellate Court is in conflict with the decision of a three judge federal court con-

struing the same statute, in conflict with decisions of this Court, and with the Fourth Amendment provisions prohibiting illegal seizure.

b. The construction by the Illinois Appellate Court, and in two decisions construing the same statute, by that court and by the Illinois Supreme Court, both subsequent to the filing of the petition for review in this case, are vague, and proscribe and punish exercise of conduct protected under the Fourth Amendment.

Alternatively, the only notice of the construction of the statute was subsequent to the conduct. This is no notice at all and *Winters* v. *New York,* 333 U.S. 507 (1947), if construed so as to give notice, should be overruled, and

c. The opinion upholding the conviction violated due process when the reviewing court

(i) reversed the chronological order of the facts in the record,

(ii) miscited a dictionary meaning of a dictionary definition of a relevant exclamation, and made factual conclusions contrary to the facts in the record, and

(iii) when the court relied on a statute not charged for its decision.

The State Has Not Overcome the Record; There Was No Cause to Use Force

Defendant seeks review where the Fourth Amendment prohibition against unreasonable seizures was violated and defendant convicted for "resisting arrest" when he was arrested by use of force (a) without probable cause for the arrest or (b) whether or not the arrest was on probable cause, but where there was no justification for the use of force to effect the arrest.

The State's Answer is that there is no right to resist either an illegal arrest or an illegal or unnecessary use of force, and the issue is clearly presented for review.(*) The use of facts by the State in its argument requires a reply—the facts do not sustain any ground for the use of force in the arrest of the defendant.

Defendant takes the position that the arrest was unlawful, and therefore that he had a right to defend himself from the use of force by Officer Sullivan. However, even if there was a lawful arrest, there was no basis to use force, the use of force was an unauthorized act, and defendant was entitled to defend himself, under the statute, Sec. 31-1, and under the Fourth Amendment.

Why did Officer Sullivan use force, i.e., grab the defendant to arrest him? The State gives several different answers, not necessarily consistent with the facts, but no answer that explains why Sullivan used force.

(*) As an afterthought, the State (S. Br. 21, 26), questions whether the issues raised here were raised below, and sets out defendant's brief to the Appellate Court (App. B) and Petition for Leave to Appeal to the Illinois Supreme Court (App. C). It appears throughout the case that defendant argued that the police officer had no right to grab him, (App. A, 39), (App. B, 47). Up to the time those documents were filed, Section 31-1 had not been construed, and the statute on its face prohibited resistance except to "unauthorized acts." Subsequently *Landry* v. *Daley, People* v. *Birnbaum,* and *People* v. *Young, infra,* reached various contradictory decisions of the construction of the statute. The State's reliance on *Zucht* v. *King,* 260 U.S. 174 (S. Br. 22, 26) is misplaced. That case applied only where no attempt to raise the question ever was made and the issue itself was waived.

Lack of any Showing of Probable Cause for Arrest, or any Showing Why Probable Cause Would Have Justified Use of Force

The State Does Not Make a Showing of Probable Cause

First, it is difficult for the State to say that there was probable cause to arrest, and the inference from the record goes the other way (S. Br. 18). The complainant was brought to the scene, but there was no effort to check the gun found there against the description in his complaint, or to allow him to see and determine whether or not it was his. Officer Sullivan found the gun, and in an instant announced the arrest. (The complainant appears never to have been heard from again). With the defendants all cooperating with the police, there was full opportunity to check and to meet the requirements of probable cause of the statute, Sec. 107(2) (c), or take no further action. Instead, the police made the arrest.

The trial court itself questioned whether the State had made a showing of probable cause (D. Br. 6-7; Trans. 25-26, 27). The Appellate Court, however *sua sponte,* found that there was probable cause to arrest. The State calls this error (S. Br. 23), but characterizes it as "mere harmless error." However, the State does not make out a case for probable cause for an arrest—let alone showing why probable cause would justify an arrest by force.

The State summarizes its position, based on its reading of the facts (S. Br. 15) on a second ground, a "contemplated" "threatened resistance":

> "The State unquestionably declares that the circumstances were such that a reasonable man could believe that a threatened resistance was being contemplated

and that Officer Sullivan's act in grabbing the defendant was justified."

To meet this imagined test—there was no basis for it in the trial court record as there was no testimony by Sullivan of any such belief of contemplation of a threat, let alone actual resistance—the State relies on defendant's exclamation when told he was under arrest (S. Br. 15):

> "Can it be said that there was a threatened resistance when Jeff Fort answered Officer Sullivan's announcement of arrest by saying 'Bullshit?'"

The State does not take issue with the holding of *Civil Service Comm.* v. *Oratowski,* 3 Ill. App. 2d 551, 123 N.E. 2d 146 (1954); actual swearing at a police officer is not grounds for arrest or use of force. In this case the defendant merely exclaimed "bullshit," commonly known to mean "you're kidding." Random House Dictionary of the English Language, unab., "bullshit . . . interj[ection]. 4. (used to express disbelief, disapproval, or the like)." The trial court seems to have taken no note of defendant's exclamation (unless he thought that swearing was worse than the actual fighting with the police by other defendants who were discharged by the court (D. Br. 9, Tr. 17). Yet the Appellate Court saw fit to read its own connotation of the term as one of "defiance" (App. 2a). (Citing Webster's which instead defines the word as talking nonsense), to justify the use of force.

However, earlier in their brief (S. Br. 10) the State, not following the Appellate Court had said:

> "It was not the one foul and vulgar word which the defendant uttered which held him open for conviction under this statute [Sec. 31-1]. It was that which followed, the pushing and hitting of the police officer (Rep. of Pro. 8)."

But how does that justify the fact that Sullivan grabbed Fort when Fort had done nothing but use a slang expression? Where in the record, let alone in law, is there any basis for use of force against a "contemplated" "threatened resistance?"

The Right to Arrest Does Not Mean Automatic Right to Use Force

It is the State's alternate position that if there was probable cause to arrest, there was automatically the right to use force (S. Br. 18):

> "The Statute [Sec. 7-5] expressly allows a police officer to use force which he reasonably believes to be necessary to effect the arrest . . ."

This is the statute that the Appellate Court found necessary to rely on even though that statute was never charged in the case.

On the facts here Officer Sullivan had no cause to use physical force, to grab the defendant even if there was cause for an arrest, under the circumstances—where the defendant had cooperated, had made no threatening gesture, and did no act of physical threat or toward escape—i.e., there was nothing justifying the use of force. See *City of Chicago* v. *Gregory,* 39 Ill. 2d 47, 233 N.E. 2d 422, (1968) (pending in this Court on other grounds, *sub nom, Gregory* v. *Chicago,* No. 60 Oct. Term, 1968). That case holds that the police, under similar circumstances, are obligated to explain, before making an arrest, and obviously it follows, to avoid the use of force if no force is necessary to effect an arrest. Even if Sec. 7-5 is read into Sec. 31-1, where in that statute does it give authority to a police officer to use force when no facts are present to justify the use of any force at all?

Subsequent Facts Cannot Justify Earlier Use of Force

The State attempts to justify the use of force by referring to facts which occurred after and as a result of the force used. The State says (S. Br. 15):

> "Can it be said under the circumstances of a milling crowd of four other men and who another officer said 'appeared to be trying to take Jeff Fort away from custody,' that Officer Sullivan's act in grabbing Jeff Fort was unjustified?"

This summary by the State is a summary of the facts reworked by the Illinois Appellate Court, and taken out of chronological order (S. Br. 11; Rep. of Pro. 8). However, what actually happened was that Sullivan announced "they were all under arrest" and Fort said "Bullshit." It was at this point that Officer Sullivan grabbed him. Only then, after he was grabbed, did Fort do anything, and then merely in reaction to being grabbed. The milling around, and belief of Officer Kovacs that there was an attempt to gain release of Fort then followed. And the record shows that prior to the time that Sullivan grabbed him, Fort and the other four young men all were peaceful and cooperative with the police. (State's Statement of Facts, (S. Br. 3; Rep. of Pro. 12, 7, 8)) and there was no cause to use force.

Any Force Is "Excessive" When No Force Is Justified

The State (S. Br. 16-17) quotes the Committee Comments to Sec. 7-7, a section also raised *sua sponte* by the Appellate Court (Opn., App. 3a). First, the Comments show (S. Br. 16) the Illinois' view through this Section that there is no right even to resist an illegal arrest, is not widely accepted:

> "While the rule as to resisting unlawful arrest usually is stated otherwise—for example, 'to constitute the offense of resisting an officer, it must be shown that the process is legal.'" (citing a string of authorities)

Second, the Comments show (S. Br. 17) that to resist excessive use of force is self-defense, not resisting, citing Sec. 7-1. If excessive force voids an arrest, so as to bar introduction of evidence seized during the arrest, Marvin E. Aspen,(*) *Arrest and Arrest Alternatives: Recent Trends,* 1966 U. of Ill. L. Forum 241 (1966), 247-248, III. *Force in Making an Arrest,* it necessarily follows that such force equally bars a conviction for resistance to the arrest.

The Construction Applied to Sec. 31-1 Violates the Fourth Amendment

The construction of the Illinois Statutes on the right to resist, basically dealing with Sec. 31-1, leave the conclusion that there is no right to resist any arrest. These cases are in conflict with the construction of Sec. 31-1 by a three judge federal court and in conflict with the Fourth Amendment and with the pronouncements of this Court.

Landry v. *Daley,* 280 F. Supp. 938 (three Judge Court, N.D. Ill., 1968.) In the *Landry* case the three judge court upheld the statute on the construction that it proscribed (pp. 959-960) "only resistance or obstruction of the legal acts of police and other officers. For instance, resistance to an illegal search and seizure would not be proscribed." (Quoted S. Br. 8).

(*) Member and draftsman of Joint Committee of the Illinois and Chicago Bar Associations to Draft the Criminal Code of 1961 and the Criminal Code of Procedure of 1963; Assistant Corporation Counsel, Chicago Law Department.

Since the time that the petition for review in this case was filed in this Court, Illinois has rendered two other decisions construing Sec. 31-1, *People* v. *Birnbaum* (Sept. '68. Set out in full, State's App. D., p. 56. Petition for rehearing pending.), and *People* v. *Young*, ... Ill. App. 2d ....., 241 N.E. 2d 587 (1968). Birnbaum was convicted of violation of Sec. 31-1. He did not dispute that he resisted when arrested while passing out leaflets. The Illinois Supreme Court, as in the present case, went to Sec. 7-5(a), denying any right to resist even an illegal arrest, in order to sustain the conviction (App. D, p. 62). In *People* v. *Young*, the Illinois Appellate Court in *dicta* came to the same conclusion. However, that Court upheld the right to resist an illegal search and seizure in a home (at pp. 589-590). To reach the conclusion the Appellate Court relied (p. 590) on Sec. 7-2, providing for a right to protect one's house. (The Court ignored Sec. 7-5(b) (Quoted, S. Br. 14)):

> "(b) A peace officer making an arrest pursuant to an invalid warrant is justified in the use of any force which he would be justified in using if the warrant were valid, unless he knows that the warrant is invalid."

The Court (p. 589) specifically rejected the argument that an act of a police officer is made "authorized" if he believes or reasonably believes it to be so.

The law in Illinois as to Sec. 31-1, and the Fourth Amendment, therefore is now:

> Sec. 31-1, construed constitutional only because it allows defense or resistance against illegal arrest or search—valid, *Landry* v. *Daley, supra.*
>
> Sec. 31-1, construed so as to allow defense against illegal search of a house, putting property over person—*People* v. *Young, supra.*

> Sec. 31-1, construed so as to read in Sec. 7-5(a) and 7-7, prohibits resistance to any police use of force in an arrest—valid, *People* v. *Fort, People* v. *Birnbaum, People* v. *Young,* (dicta), *supra.*
>
> Yet, if the force used is excessive, Sec. 7-1, there is a right to resist or defend.

The state court decisions are in conflict with the construction of a three judge federal court in *Landry* v. *Daley, supra,* in the construction of the same statute, and conflict with the general holding of this Court in *Wright* v. *Georgia,* 373 U.S. 284 (1963), 291-292:

> "Obviously, . . . one cannot be punished for failing to obey the command of an officer if that command itself is violative of the Constitution."

And to the same point, *Shuttleworth* v. *Birmingham,* 382 U.S. 87 (1965), 92. These cases dealt with constitutionally protected rights, there under the First Amendment; here it is under the Fourth Amendment prohibition against illegal seizure.

The Construction of Sec. 31-1 Leaves the Statute Vague and Overbroad and Therefore It Is Void

Under these myriad, contradictory, and conflicting constructions of Sec. 31-1, the statute as construed is void for vagueness and overbreadth, for just as in the First Amendment cases, it both proscribes and punishes constitutionally protected conduct, here under the provisions of the Fourth Amendment.

Moreover, the only way that defendant can be charged with knowledge of the construction, or constructions, of the statute is by relating back any such construction to 1966. But even *Winters* v. *New York,* 333 U.S. 507 (1947) has never been stretched to reach so far, to pull in con-

structions in other cases, *Shuttlesworth* v. *Birmingham, ibid,* 92, or of different statutes not charged. *Cox* v. *Louisiana,* 379 U.S. 546 (1946), 556. *Winters* holds that a state court interpretation of a statute shall be binding on this Court. To the extent that doctrine says that such a construction has retroactive effect on the parties involved, i.e. to give notice retroactively of the construction of the statute, it does not appear to reconcile with the more recently developed doctrine of constitutional retroactivity, which is for the benefit, not the detriment, of the defendant, see *Reck* v. *Pate,* 367 U.S. 433 (1961), the *Mapp* v. *Ohio* question, and cases and commentaries following. But, if it is to be said that defendants did have notice under some interpretation of *Winters,* that notice was inadequate under established requirements of the Fifth Amendment, then *Winters* v. *New York* should be overruled.

CONCLUSION.

For the reasons set forth this Court should grant the petition for review and reverse the conviction below.

Respectfully submitted,

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